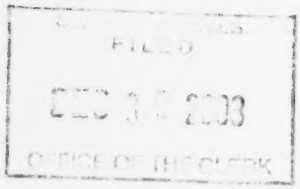

(3)

No. 03-592

IN THE

Supreme Court of the United States

FREDERICK SCHULTZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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1. Under the court of appeals' construction of the National Stolen Property Act (NSPA), 18 U.S.C. § 2315, each of the following persons will be guilty of the federal crime of possessing stolen property:

- an individual whose property is ordered confiscated by an authoritarian foreign state, and who attempts to safeguard her family heirlooms by bringing them to the United States (as well as any American dealer who purchased them);[1]
- an American tourist who purchases a Maori carving from a reputable shop in London and who later reads in the newspaper that New Zealand claims ownership of all such artifacts, but who has no inkling that he might be prosecuted under U.S. law for retaining the carving and no idea how the object might be returned to the New Zealand government;[2] and
- anyone who purchased any of the Egyptian antiquities at issue in this case from petitioner at his New York gallery and who later learned about his con-

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[1] The government essentially acknowledges this point. *See* Br. in Opp. 13 ("But while petitioner characterizes the property rights established by Law 117 as 'exotic,' nationalization of property by foreign governments is scarcely unique to Egypt (or to the preservation of antiquities." (citation omitted)). Recognizing the outlandishness of this result, the government attempts to modify its argument that all foreign governmental assertions of property interests must be given effect under the NSPA with the qualifier "at least absent extraordinary circumstances." *Id.* The government gives no guidance, however, as to which kinds of foreign laws (including confiscations of private property) should be considered "extraordinary" and which should not.

[2] *See* Br. in Opp. 11 ("As petitioner correctly observes, a person who initially purchases antiquities in good faith will be subject, under the court of appeals' decision, to potential criminal liability if he retains the objects *after* learning that they were removed from Egypt in violation of Law 117." (citation omitted)); Pet. App. 27a-31a (court of appeals' rejection of "mistake of American law" defense).

viction, even if the buyer had no idea at the time of purchase that Egypt had a cultural patrimony law.[3]

As these results make clear, there is something seriously amiss about the court of appeals' decision, for it brings within the NSPA conduct that most Americans would never imagine could be punishable as a crime. Our own legal system would not treat a private individual's possession or disposition of property that he legitimately obtained by discovery or purchase as "stealing" merely because the government had declared itself the owner of that property, without offering compensation. Such broad governmental assertions of ownership over property held in private hands, without compensation, are contrary to our Constitution and common law. And Congress should not be presumed to have intended the NSPA to depart so drastically from deeply held assumptions in our legal system, for "Congress in enacting criminal statutes legislates against a background of Anglo-Saxon common law." *United States* v. *Bailey*, 444 U.S. 394, 415 n.11 (1980).

Notably, the government does not take issue with our point that Egypt's Law 117 and similar sweeping cultural patrimony laws *are* inconsistent with our legal system.[4] Rather, the government's response is that individuals and federal courts must accept foreign law—including foreign governments' expropriation of private property—"as they found it." Br. in Opp. 13. But petitioner was not prosecuted for violating foreign law; he was prosecuted for violating

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[3] *See* Br. in Opp. 4 (noting Robin Symes' purchase of sculpture from petitioner); *supra* note 2.

[4] Nor does the government even attempt to defend the court of appeals' reliance on *United States* v. *Turley*, 352 U.S. 407 (1957), which held only that the deceptive and wrongful taking of property that would be protected under any legal system may be considered "stealing" under the NSPA, not—as the court of appeals seemed to think—that any foreign government's assertion of a property interest in an object, no matter how remote from our own legal system, can support prosecution under the NSPA.

American law. The question here is not whether Egypt might bring some legal action against petitioner in its own courts based on its own law, but whether our federal criminal law should uncritically accept any foreign government's assertion of a property interest, no matter how contrary it is to our law—at least absent clear direction from Congress that our law should defer so completely to foreign law. Thus, the government's reliance on *United States* v. *Mitchell*, 985 F.2d 1275 (4th Cir. 1993) (*see* Br. in Opp. 13 n.4), is particularly unfounded. *Mitchell* involved a prosecution under the Lacey Act, 16 U.S.C. § 3372, which expressly makes it unlawful to import wildlife taken "in violation of any foreign law." The Lacey Act shows that Congress knows how to incorporate foreign law by reference when it intends that any violation of foreign law shall also be deemed a violation of American law. The NSPA contains no similar incorporation of foreign law by reference.[5]

2. The court of appeals' decision makes the content of federal criminal law turn on elusive distinctions in foreign cultural patrimony laws, which may be difficult to understand or even find. Absent an express indication by Con-

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[5] Nor does *United States* v. *Pierce*, 224 F.3d 158 (2d Cir. 2000), support the government's argument that any foreign law asserting governmental ownership over property must be given controlling effect under the NSPA. In *Pierce*, the government contended that the defendants had unlawfully attempted to deprive the Canadian government of tax revenues by smuggling liquor across the border. The court of appeals reversed the conviction because the government had not proven the existence of any Canadian statute setting forth an obligation to pay import duties on liquor. *Id.* at 166, 168. That case does not establish even by negative implication that any foreign government's assertion of a legal obligation is to be given automatic effect in U.S. domestic law. The conduct alleged in that case—a scheme to deprive a government entity of tax revenues through evasion of import duties—would likely be unlawful in every country in the world, and certainly would be unlawful under U.S. law if the object of the scheme had been the U.S. government. The conduct for which petitioner was prosecuted in this case, however, would not have been unlawful had the property in question been discovered in the United States.

gress—as in the Lacey Act—that federal law should incorporate foreign law, no matter what its content, one should hesitate to conclude that Congress intended personal liberty to depend on such arcane matters. The government suggests that "there is no reason to suppose that the construction of national patrimony laws will pose unique interpretive difficulties." Br. in Opp. 14. But such laws do pose extraordinary interpretive difficulties for courts and for individuals who are involved in buying and selling art on a daily basis and who must, in the end, hazard a guess as to whether an art object might be covered by a "true" ownership law or only by a "mere" export regulation. Criminal liability turns on the difference—even when the law in question cannot with confidence be characterized as one or the other. *See* Pet. 18 & n.16 (discussing ambiguous laws of France, Guatemala, and New Zealand).[6]

The government's citation to *Mitchell* for the proposition that federal courts routinely interpret foreign laws (*see* Br. in Opp. 13 n.4) is hardly reassuring. That case involved a criminal prosecution under the Lacey Act that turned on the scope and validity of Pakistani laws regulating the hunting and export of wildlife. The *Mitchell* court struggled to resolve issues that would have presented a challenge even if they had arisen under American statutes—such as whether a "*bona fide* baggage" exception to export restrictions applied to all goods covered by the restrictions, or only to a

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[6] Such difficulties were in fact abundant both in this case, where conflicting testimony was presented to the district court about the character of Law 117 (*see* Pet. App. 10a-11a), and in *United States* v. *McClain*, 545 F.2d 988 (5th Cir. 1977), where the court of appeals was required to parse five Mexican statutes, with doubtful results (*see* Pet. 17 & n.15). In both cases, the defendants contended that they did not believe that the foreign state in question had asserted "true" ownership rights over cultural property. And although we dispute the government's characterization of the factual record in this case (*cf.* Pet. 3-6), the evidence, even as characterized by the government, is equally consistent with a conclusion that petitioner believed that Law 117 was merely an export restriction rather than a "true" ownership law.

subcategory, 985 F.2d at 1281, and whether a provincial hunting law infringed on the powers of the national government, *id.* at 1283. The court remarked on the "general unavailability of foreign legal materials," and was unable to arrive at a "definitive answer as to the official Pakistiani interpretation of the laws," especially since neither party had been able to produce "any cases bearing on the laws." *Id.* at 1280-1281. The court also noted that federal courts faced with the task of interpreting foreign law had relied on such sources as "a student note in a Philippine Law Review" and "a law clerk['s] . . . telephone conversation with the Hong Kong Trade Office." *Id.* at 1280. None of this lends much support to the government's breezy assertion that it should be a relatively simple matter for nonlawyers to discern whether or not a foreign country's cultural patrimony law is a "true" ownership law that covers particular items.

3. In our petition (at 15-16), we noted that while the heavily criticized case of *United States* v. *McClain*, 545 F.2d 988 (5th Cir. 1977), sent a shock through the art world when it was decided in 1977, that case had, for all practical purposes, become a historic footnote.[7] In its opposition, the government is unable to cite even one other NSPA prosecution in the 25 years since *McClain* that was based on the

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[7] The government cites *United States* v. *Holinshead*, 495 F.2d 1154 (9th Cir. 1974) (*see* Br. in Opp. 9), but that case, decided a few years before *McClain*, presented very different facts and as such did not engender similar controversy. *Holinshead* involved the theft of a monumental Guatemalan stela. "Guatemala's ownership of the stela was uncontested," Paul M. Bator, *An Essay on the International Trade in Art*, 34 Stan. L. Rev. 275, 346 n.125 (1982), and "the issue whether a governmental declaration of ownership was sufficient to sustain a conviction under the National Stolen Property Act does not appear to have been litigated," James R. McAlee, *From the Boston Raphael to Peruvian Pots: Limitations on the Importation of Art into the United States*, 85 Dick. L. Rev. 565, 579 n.60 (1981). Indeed, "the stela had actually been registered as a Guatemalan national monument." Bator, 34 Stan. L. Rev. at 346 n.125. Professor Bator described the *Holinshead* case as a "fluke" involving "remarkable coincidences"; as a result, the case "did not shake the general assumption[s]" surrounding the criminal liability of art importers. *Id.* at 346.

theory that property belonged to a foreign government because of the operation of a cultural patrimony law. The government faults us for failing to cite any decision "that has refused to apply the NSPA to property taken in violation of foreign law based on the perceived repugnance of that law to our own legal system" (Br. in Opp. 13-14), but of course, no court could have rejected *McClain*, for the government has never relied on that decision—until this case.[8] But now that the *McClain* theory has been adopted by the circuit with jurisdiction over the center of the art market in the United States (a point the government does not contest), it has suddenly been transformed from a dormant legal curiosity into the controlling law for all in this country who buy or sell cultural property of any kind.

As we explain below (pp. 7-9), there is a good explanation for *McClain*'s long eclipse; that decision cannot be reconciled with the later-enacted Cultural Property Implementation Act (CPIA), 19 U.S.C. §§ 2601 *et seq.*, which rejected

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[8] The government gamely cites *United States* v. *Long Cove Seafood, Inc.*, 582 F.2d 159 (2d Cir. 1978), as "citing *McClain* with approval" (Br. in Opp. 9), but in fact that decision rejected a prosecution theory very similar to the one put forward here. In *Long Cove*, the government argued that the defendants violated the NSPA by transporting clams that had been harvested in contravention of a New York law that asserted state ownership over shellfish. Turning aside the government's contention that the clams were "stolen" simply because New York claimed to own them, the court of appeals stated, "[e]ven under the broad definition in *Turley*, stealing is still essentially an offense against another person's proprietary or possessory interests in property.... [T]he question whether a particular item is 'stolen' cannot be decided in a vacuum, without considering whether there has been some sort of interference with a property interest." *Id.* at 163 (citations omitted). The court of appeals stressed that, under the common law, shellfish belong to the owner of the property where they are found, *id.* at 163-164, and that New York's asserted ownership was "no more than a 19th century legal fiction," *id.* at 165 (internal quotation marks and citation omitted). The court's supposed "approval" of *McClain* in *Long Cove* amounted to nothing more than the conclusion that the government's theory of prosecution in *Long Cove* would not have satisfied even the *McClain* court's extraordinarily expansive construction of the NSPA.

the premise that American law must accept a foreign government's broad assertion of ownership over artifacts in a cultural patrimony law. The government's *only* evidence for the vitality of *McClain* during the intervening years is 1985 testimony before a Senate subcommittee by a Justice Department official who opposed a bill that would have expressly overruled *McClain*. *See* Br. in Opp. 10. That very testimony, however, undermines the government's argument. That official told the Senate subcommittee that "this has not been a pressing problem. Since *McClain*, there have been no actual prosecutions under the act."[9] He further minimized the importance of *McClain* by testifying that, to the Department of Justice's understanding, only Mexico had a "true ownership" law that could support prosecution under the NSPA.[10] Especially in light of the Justice Department's depiction of *McClain* as a one-time oddity, one cannot read Congress's failure to overrule *McClain* as an endorsement of that decision, as the government suggests (*see* Br. in Opp. 11). "[S]everal equally tenable inferences may be drawn from such inaction." *Pension Benefit Guar. Corp.* v. *LTV Corp.*, 496 U.S. 633, 650 (1990) (internal quotation marks and citation omitted). Congress may have relied on the Department's representation that *McClain* did not present a "pressing problem" and concluded that no remedial legislation was needed.

4. Under the court of appeals' decision, the NSPA in effect bars the importation into the United States of any cultural object over which a foreign state has asserted ownership in a cultural patrimony law. Any such object would be deemed "stolen" under the NSPA when it was removed from its country of origin without the government's permission, and its importation here would be illegal. But if that is

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[9] *Relating to Stolen Archaeological Property: Hearing on S. 605 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 29 (1985) (testimony of James Knapp).

[10] *Id.* at 35. He further noted that ascertaining the meaning of the Mexican laws in *McClain* had been "extremely difficult." *Id.* at 64.

so, then it is impossible to understand what Congress and the Executive Branch were attempting to accomplish in either the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (Nov. 14, 1970), 823 U.N.T.S. 231 (1972), or the CPIA, which implements the Convention. As we have explained (Pet. 20-25), in both measures the United States government *rejected* the proposition that the U.S. should bar the importation here of all property covered by foreign cultural patrimony laws. That rejection was based on the congressional judgment that neither preservation of culturally sensitive property nor understanding of other cultures is best served by a ban on the international circulation of cultural objects merely because another country claims to own them as part of its cultural patrimony.

The government observes that "the CPIA does not specifically refer to [national patrimony] laws." Br. in Opp. 16. But that is precisely our point; both the Convention and the CPIA *rejected* the proposition that any country's import regulations must defer to any other country's cultural patrimony law. The government fails even to acknowledge the drafting background to the Convention, which the United States initially declined to accept precisely because the original draft adopted a "blank check" approach requiring signatories to accept each others' assertions of state ownership over cultural property. *See* Pet. 21-22. The Convention was eventually framed to allow the United States to *permit* the importation of cultural objects claimed by other countries.

Congress did exactly that in the CPIA, in which it adopted the principle that "U.S. actions in these complex matters should not be bound by the characterization of other countries." S. Rep. No. 97-564, at 27 (1982). The CPIA establishes a highly focused regime that (a) bars the importation only of property stolen from certain institutions and cultural property subject to emergency measures, and (b) otherwise allows the importation of many cultural objects to which another country claims ownership—including the

Egyptian antiquities at issue in this case. *See* Pet. 23-24. Yet the court of appeals held that the NSPA *criminally punishes* the same act. Thus, there is a dramatic inconsistency between the CPIA and the NSPA, as the latter was construed by the court of appeals. But under our submission, the two acts are entirely consistent.

5. The court of appeals' construction of the NSPA would raise serious concerns even if it involved lumber or iron ore, but the decision's effect on the international art trade only heightens the need for this Court's review. If allowed to stand, this decision, coming as it does from the jurisdiction where the nation's art capital is located, will effectively be the law of the land affecting all who buy, sell, or merely enjoy looking at works of art. And the decision is bad as both law and policy, for it will surely chill the circulation of art. In the future, both buyers and sellers will understandably be uncertain whether cultural objects—even if long believed to be legitimately held in private hands and even if supported by provenances tracing the chain of title for decades—might someday be subject to a claim of ownership under a foreign cultural patrimony law of which the parties had no awareness.

The government expresses skepticism about such a chill, noting that even now, purchasers of antiquities undertake some risk that the items might later be shown to have been stolen. *See* Br. in Opp. 11. Of course, anyone who purchases anything—be it art works or apples—bears some risk that the purchased item might be stolen, but the court of appeals' decision greatly magnifies the uncertainty. When a collector or a museum purchases a work of art, the buyer can insist on a provenance and, if the provenance is sufficiently lengthy and detailed, can conclude that it is unlikely that someone else will lay claim to the object. But under the court of appeals' decision, even if the object has been in private hands for decades, and even if each transfer over those decades is well documented, the buyer must now consider whether a foreign government might eventually produce an obscure regulation under which it asserts ownership—just as Mexico did in *McClain*, where it claimed that the objects

were covered by an 1897 cultural patrimony law (*see* Pet. 17 n.15). It is hardly reassuring to such a purchaser to hear that a federal court might eventually conclude that the law was a "mere" export restriction rather than a "true" ownership law (as happened in *McClain*, where the court of appeals rejected the Mexican government's reading of the 1897 law). The mere prospect that our government might prosecute someone for possessing an object arguably covered by a cultural patrimony law would frighten any reasonable person away from buying such an object.

That overdeterrence would come at a great cost. Art is one of the great treasures of humanity. Our ability to see the art of other lands and times expands our horizons by increasing our awareness of other ways of living and thinking. A decision like that of the court of appeals, which deters and punishes the circulation of art, should not be taken lightly. This Court's review is warranted so that the court of appeals' gravely mistaken decision does not become the law of the land.

* * * * *

For the foregoing reasons, as well as those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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